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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL OROZCO, Defendant and Appellant.	2d Crim. No. B215082 (Super. Ct. No. 1183645) (Santa Barbara County)

Gabriel Orozco appeals from the judgment entered following his conviction by a jury of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and possession for sale of methamphetamine. (Health & Saf. Code, § 11378.) The trial court found true allegations of two prior prison terms (Pen. Code, § 667.5, subd. (b))[1] and two prior serious or violent felonies within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) Appellant was sentenced to prison for 27 years to life: 25 years to life plus two years for the two prior prison terms.

Appellant contends that: (1) the trial court erroneously denied his section 1538.5 motion to suppress evidence seized following a police officer's unlawful stop of the vehicle he was driving; (2) his sentence of 27 years to life constitutes cruel and

[1] All statutory references are to the Penal code unless otherwise stated.

unusual punishment under both the federal and state constitutions; and (3) the trial court abused its discretion by refusing to dismiss one of the prior strike convictions.

Pursuant to section 1465.8, subdivision (a)(1), we modify the judgment to impose a $20 security fee on each of appellant's two convictions. We affirm the judgment as modified.

Facts

At approximately 5:00 p.m. on May 2, 2006, Officer Alex George of the Santa Maria Police Department was off duty and driving his personal vehicle in the City of Santa Maria. He saw a van that was being driven by a male Hispanic. He recognized the female passenger in the van as Athena Ronquillo. He "got a good look at her" when the van was stopped and she was about 20 feet away, so there was "absolutely no doubt in [his] mind" of her identity. George had contacted Ronquillo on two prior occasions, and he knew that there was an outstanding $25,000 warrant for her arrest. George believed that the warrant was for being under the influence of a controlled substance in violation of Health and Safety Code section 11550. George memorized the first three or four characters of the van's license plate. The van had "an odd color, primer gray."

George contacted dispatch over a portable radio. Dispatch confirmed that there was an "active warrant" for Ronquillo's arrest. George asked that on-duty officers be directed to stop the van. When the officers arrived, the van was parked at an apartment complex and its occupants had left. The officers searched the area but were unable to locate Ronquillo.

Three days later, on May 5, 2006, George was on duty in the afternoon and was driving a marked black-and-white vehicle in the City of Santa Maria. He saw the same gray van make a left turn out of a gas station. He immediately thought that Ronquillo might be inside the van. The van was "in a different part of town" compared to where it had been when George had seen it three days earlier.

George was traveling in the same direction as the van and was ahead of it. He made "a U-Turn to try [to] do a windshield-to-windshield look." George saw that the driver was a male Hispanic and that a female was seated on the passenger side. George was unable to discern whether the passenger was Ronquillo. He confirmed that the first three or four characters of the van's license plate number matched the license plate number of the van in which Ronquillo had been a passenger three days earlier. Both vans were from the same model year.

George "made another U-Turn to try to catch up to the vehicle." The van was being driven in what George considered to be an "evasive" manner. It was exceeding the speed limit and was traveling via an indirect route that involved several turns. George decided to stop the van to determine whether Ronquillo was the female passenger.

George caught up to the van and turned on his red lights. The van pulled over and came to a stop. George stopped his vehicle behind the van. He got out and walked toward the driver's side of the van. George could see "very slightly" into the van through its side widows, "but not enough to identify somebody."

For "officer safety," George stood behind the driver's door instead of next to it. George explained that it is safer to stand behind the driver's door "in case [the driver is] going to shoot at you or attack you it's tougher for [the driver] to turn and reach over the post of the vehicle. It is easier for me to back up and go toward my patrol car for cover."

The driver was appellant. George asked him for his driver's license and vehicle registration. Appellant was "extremely nervous." He started looking for the paperwork in an area between the driver's and front passenger's seats. George could not see appellant's hands, so for "safety reasons" he asked appellant "to stop what he was doing and to just give me his name." Appellant gave his correct name. George directed appellant to get out of the van and asked if he was on probation or parole.

Appellant got out of the van and said that he was on parole for second degree murder. George called for back-up officers.

George patted down appellant to make sure that he did not have any weapons. During the pat-down, for the first time George had "a clear and unobstructed view of the female passenger" inside the van. George recognized the passenger as Christina Valdez, not Athena Ronquillo. Valdez and Ronquillo "do not look at all like each other."

When the back-up officers arrived, George asked them to do a parole search of appellant's pockets. During the search, the officers found nine individually wrapped bindles. The bindles contained 8 grams of methamphetamine.

George searched the van and found a fanny pack on the floorboard between the driver's and front passenger's seats. Inside the fanny pack were appellant's wallet, a scale, and a plastic baggy that contained 55.54 grams of methamphetamine. An expert witness opined that appellant had possessed the methamphetamine for the purpose of sale. According to the expert, the street value of the 55.54 grams of methamphetamine was approximately $5,500.

Motion to Suppress and Trial Court's Ruling

In his written motion to suppress evidence pursuant to section 1538.5, appellant argued that Officer George had unlawfully stopped the van because the facts did not support a reasonable suspicion that the female passenger was Ronquillo. Appellant further argued that, "[b]y the time the officer approached the driver he knew or should have known that the passenger was not Athena Ronquillo."

In denying the motion, the trial court declared: "Here we have a person with a warrant that was seen three days prior, and there is little doubt in my mind this appears to be the same vehicle. [¶] The officer makes a turn on it, can't quite identify it, but again, it's a man and it's a woman which match the criteria they had before when the . . . person with the $25,000 warrant was seen. [¶] And there [were] some evasive motions. So I think the officer is justified in making the stop."

Standard of Review: Motion to Suppress

"[O]n review of a motion to suppress evidence pursuant to section 1538.5, ' "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court." ' [Citation.]" (*People v. Adair* (2003) 29 Cal.4th 895, 906.) "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The Trial Court Properly Denied Appellant's Motion to Suppress

Appellant "challenges the court's legal conclusion that [the] facts supplied George with reasonable suspicion to initiate a traffic stop of the van."
A police officer may make an investigatory stop of a vehicle if he has a reasonable suspicion based on specific and articulable facts that there is an outstanding warrant for a passenger's arrest. (*In re William J.* (1985) 171 Cal.App.3d 72, 77.)

Appellant does not dispute that George had reasonable grounds to believe that there was an outstanding warrant for Ronquillo's arrest. Appellant argues that George lacked a reasonable, articulable suspicion that Ronquillo was a passenger in the van when George stopped it on May 5, 2006.

We disagree. George reasonably believed that the van he saw on May 5, 2006, was the same van in which Ronquillo had been a passenger three days earlier. Both vans were from the same model year, shared the same "odd color, primer gray," and were traveling in the same city. As George noted, Santa Maria "is not that big of a city." Moreover, the driver of both vans was a male Hispanic. Most important, the first three or four numbers of the license plates of both vans were identical.

On the two occasions when George saw the van, it had a female passenger. On the first occasion (March 2, 2006), George was sure that the passenger was Ronquillo. Since only three days separated the first and second occasions, it was reasonable for

George to suspect that the female passenger on the second occasion (March 5, 2006) was also Ronquillo. That suspicion was strengthened when the driver of the van appeared to take evasive action once it became clear that a police vehicle was following him.

Unlike the first occasion, on the second occasion George was unable to confirm that the female passenger was Ronquillo. On the first occasion, George "got a good look at her" when the van was stopped and Ronquillo was about 20 feet away. On the second occasion, George explained that "we were both traveling opposite directions so it was like a split second I had to confirm whether [Ronquillo] was the passenger or not." Accordingly, George made a lawful investigatory stop of the van to determine whether the female passenger was in fact Ronquillo.

It is of no consequence that the passenger was a different person who did "not look at all like" Ronquillo. "[T]he reasonableness of an officer's stopping a vehicle is judged against an objective standard: would the facts available to the officer at the moment of the stop ' "warrant a man of reasonable caution in the belief that the action taken was appropriate [?]" ' If the officer turns out to have been mistaken the mistake must be one which would have been made by a reasonable person acting on the facts known to the officer at the time of the stop." (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1148-1149, fn. omitted.) Here, a reasonable person acting on the facts known to George at the time of the stop would have suspected that Ronquillo was a passenger in the van.

Appellant argues that George's conduct after the stop intruded upon his Fourth Amendment rights because it went beyond what was necessary to ascertain the identity of the female passenger: "[George] did not simply look inside the car to confirm or dispel the female occupant's identity. He approached the driver, 'who could have been anyone'. . . , demanded identification, and began to remove the driver from the car before ever looking at the female occupant. A quick look at the female

occupant would not have led George to believe that she matched the description of Ronquillo, but would have *immediately* dispelled his suspicion."

Officer George cannot be faulted for his conduct after he stopped the van. George explained that, for his own safety, he had stood behind the driver's door instead of next to it. At this position, he was unable to see the passenger well enough to identify her. George could not reasonably be expected to expose himself to a risk of harm from the driver by standing next to the driver's door and peeking in through the window to view the passenger. This was not a routine stop to issue a traffic citation, but a more dangerous situation involving a stop for the purpose of arresting an occupant of the vehicle on an outstanding warrant. When the driver started looking for his paperwork between the driver's and front passenger's seats and George could not see his hands, for safety reasons George reasonably ordered the driver out of the van. In view of the reasonableness of George's actions, he did not intrude upon appellant's Fourth Amendment rights.

Appellant's Sentence Does Not Constitute Cruel and Unusual Punishment

Appellant contends that his sentence of 27 years to life constitutes cruel and unusual punishment under both the federal and state constitutions. Based on *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 155 L.Ed.2d 108], and *Lockyer v. Andrade* (2003) 538 U.S. 63, [123 S.Ct. 1166, 155 L.Ed.2d 144], appellant's sentence does not violate the federal prohibition against cruel and unusual punishment. (U.S. Const., 8th Amend.) The *Ewing* court upheld the constitutionality of a 25-year-to-life sentence for a defendant who had been convicted of stealing three golf clubs. The defendant had four prior strike convictions: three residential burglaries and one robbery. The *Andrade* court upheld the constitutionality of two consecutive terms of 25 years to life for a defendant who had been convicted of two counts of stealing videotapes. The total value of the videotapes was $153.54. The defendant had three prior strike convictions for residential burglary.

Since the sentences in *Ewing* and *Andrade* did not violate the federal constitutional prohibition against cruel and unusual punishment, it follows that appellant's sentence also passes federal constitutional muster. Appellant's present offense – possession of methamphetamine for the purpose of sale – is more serious than the minor theft offenses in *Ewing* and *Andrade*. Appellant's prior strikes – second degree murder and attempted murder – are extremely violent offenses. The *Andrade* opinion does not suggest that the defendant's three prior residential burglaries involved violence, yet the defendant's sentence of two consecutive terms of 25 years to life was nearly twice as long as appellant's sentence of 27 years to life. (See also *Rummel v. Estelle* (1980) 445 U.S. 263 [100 S.Ct. 1133, 63 L.Ed.2d 382] [Supreme Court upheld constitutionality of sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses, even though the defendant's prior offenses consisted of passing a forged check in the amount of $28.36 and fraudulently using a credit card to obtain $80 worth of goods or services].)

We also reject appellant's claim that his sentence violates the California Constitution's prohibition against cruel or unusual punishment. (Cal. Const., art. I, § 17.) A sentence violates the California Constitution if "it is so disproportionate to the crime for which it is [imposed] that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Appellant's sentence is not disproportionate because he is being punished not just for his current offense, but also for his recidivism. "When faced with recidivist defendants such as [appellant], California appellate courts have consistently found the Three Strikes law is not cruel [or] unusual punishment. [Citations.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.) "Appellant's intractable recidivism, coupled with his current offense, justify the term imposed." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.)

The Trial Court Did Not Abuse Its Discretion by
Refusing to Dismiss One of the Prior Strike Convictions

Appellant contends that the trial court erroneously refused to dismiss one of the prior strike convictions. "[A] court's [refusal] to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In exercising its discretion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the . . . spirit [of the "Three Strikes" scheme], . . . and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Garcia* (1999) 20 Cal.4th 490, 503.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377.)

The trial court did not abuse its discretion by refusing to dismiss one of the prior strike convictions. Appellant has spent most of his adult life in prison for the commission of serious and violent offenses. In 1985, when he was 18 years old, appellant was convicted of second degree murder. He was committed to the California Youth Authority and was released on parole in August 1991. Less than three years later, in March 1994, appellant committed attempted murder. He was sentenced to prison for 14 years and was released on parole in August 2005. Approximately nine months after his release, and while still on parole, he committed the present offense. The probation report notes: "Over the past 24 years, [appellant] has been in custody at least 21 of those years. . . . [¶] . . . When given the opportunity to start over, he has returned immediately to the criminal lifestyle to which he is so accustomed."

In view of appellant's criminal record and failure to rehabilitate himself during lengthy prison incarcerations, we cannot say that the trial court's refusal to dismiss one

of the strikes was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377.) The trial court reasonably concluded that appellant did not fall outside the "spirit" of the "Three Strikes" scheme. (See *People v. Williams, supra,* 17 Cal.4th at p. 161.)

Security Fee

Respondent points out that the trial court failed to impose a security fee on each of appellant's two convictions. Section 1465.8, subdivision (a)(1), requires the court to impose a $20 security fee on every conviction for a criminal offense, and the failure to do so may be corrected by the appellate court. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.)

Disposition

The judgment is modified to impose a $20 security fee on each of appellant's two convictions. (§ 1465.8, subd. (a)(1). As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

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